

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 26, 2009 Session

REGINALD G. PECK v. HOCHMAN FAMILY PARTNERS, L.P., ET AL.

**Direct Appeal from the Chancery Court for Hamilton County
No. 05-1163 W. Frank Brown, III, Chancellor**

Filed October 14, 2009

No. E2008-2118-WC-R3-WC - Mailed August 25, 2009

The employee, Reginald G. Peck, sought benefits for an alleged work-related injury to his lower back. The trial court found for the employer, Hochman Family Partners, L.P., and dismissed the complaint. Mr. Peck has appealed, contending that the trial court erred by entering judgment for the employer, and by denying his motion to alter or amend the judgment.¹ We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which GARY R. WADE, J. and E. RILEY ANDERSON, SP. J., joined.

Reginald G. Peck, Chattanooga, Tennessee, appellant pro se.

John T. Rice, Chattanooga, Tennessee, for the appellees, Hochman Family Partners, L. P. and Builders Mutual Insurance Company.

MEMORANDUM OPINION

Factual and Procedural Background

Reginald Peck, Sr., worked as a handyman for Hochman Family Partners, L.P. ("Hochman"), a real estate management concern. He alleged that he sustained an injury to his lower back on November 24, 2004, while crawling underneath a house to repair a broken water main. He

¹This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law

testified that, after completing the job, he spoke to Coleman Hochman, the general partner of Hochman, by telephone. Mr. Peck said that he told Mr. Hochman at that time that he had injured his back. Neither man considered the injury to be serious at that time. Hochman advised him to rest over the Thanksgiving holiday.²

Mr. Peck testified that his pain increased over the next few days. On Monday, November 29, 2004, he went to the emergency room of a local hospital. The record of that event was placed into evidence, and was a significant basis of the trial court's decision. On a portion of the record filled out by Mr. Peck, a box asking if the injury was work-related was left unchecked but, in the same box, Mr. Peck listed Hochman as his employer. On another portion of the record, completed by hospital personnel, the employer is identified as "Wilkerson Corporation," rather than Hochman, and the "RFV" (presumably 'reason for visit') is stated as: "Pain in lower back. Onset 2000." The history recorded by the emergency room physician states: "Pt. reports back started a couple of days ago. Pt. c/o low back pain x 2days. Pt. denies injury. . . . Pt. thought it was arthritis: wakes up with stiffness in back." During the visit, Mr. Peck was attended by Dr. John W. Besing, who diagnosed a sprain in the lumbar region.

Mr. Peck was given an injection of toradol, a prescription for a muscle relaxer, and a ten-pound lifting restriction and was referred to his primary care physician. Mr. Peck testified that he returned to the same emergency room approximately a week later and thereafter sought treatment from his primary care physician, Dr. William B. Findley. Dr. Findley apparently ordered an MRI, but neither Dr. Findley's records, nor those of the second emergency room visit, were placed into evidence.

Dr. Findley referred Mr. Peck to Dr. Steven Humphreys, an orthopaedic surgeon. Dr. Humphreys testified by deposition. He saw Mr. Peck on five occasions from March 1, 2005 to September 14, 2005. Mr. Peck gave an initial history of having "increased discomfort" in his lower back while working under a house. The pain had become progressively worse over time. Dr. Humphreys' initial diagnosis was "degenerative arthritis with an overlaying strain." Based upon an examination of Mr. Peck and review of the MRI study, Dr. Humphreys also diagnosed Mr. Peck as having degenerative arthritis of the lumbar spine and disk bulges (herniated nucleus pulposus) at L3-4 and L4-5, with a minimal disk bulge at L5-S1. Mr. Peck also had borderline spinal stenosis which Dr. Humphreys described as narrowing around the nerve roots. According to Dr. Humphreys, neither the degenerative arthritis nor the spinal stenosis were caused by Mr. Peck's employment. Dr. Humphreys' physician's assistant, Kurt Pulver, thought a majority of Mr. Peck's discomfort was due to muscle spasm and prescribed a muscle relaxant, anti-inflammatory medication and physical therapy. He later prescribed a series of three lumbar steroid injections. Mr. Peck had only two of those due to insurance coverage problems. Mr. Peck improved for a while, but later reported that his condition gradually worsened to its original state.

Dr. Humphreys testified that while Mr. Peck had a pre-existing degenerative condition in his back, it was "reasonable" that an incident such as crawling under a house could injure a disk or cause

²November 24, 2004 was the Wednesday immediately preceding Thanksgiving.

a “deep strain” which eventually became chronic. He testified it would be impossible to tell unless one had an MRI immediately before and immediately after the incident. Dr. Humphreys stated that if Mr. Peck had a pre-existing condition, the physician would have to determine whether this was a normal flare-up or a flare-up beyond the pre-existing condition. Mr. Peck was six feet, two inches tall and weighed three hundred ten pounds. Dr. Humphreys testified his weight indicated a lack of conditioning in his core musculature which made him more susceptible to injury. Based solely on Mr. Peck’s complaints of pain, Dr. Humphreys opined that Mr. Peck had an impairment of 5% to the body as a whole. He admitted, however, that because there was no sign of muscle spasm during his last visit, it could be argued that he had no impairment.

Hochman introduced a summary of Mr. Peck’s time sheets from 2004 until the date of trial. Among other things, these showed that the last day he worked in 2004 was November 22, and that he did not work again until the week of February 27, 2005. Mr. Peck worked 40 hours the week of March 28, 2005, 37.5 hours the week of April 4, 2005, and roughly 30 to 50 hours per week thereafter. In addition to working for Hochman, Mr. Peck owned some apartment buildings and performed some of the maintenance on those buildings. At the time of trial, he continued to work for Hochman and manage the apartments that he owned. Mr. Peck testified that he had no back problems of any sort prior to November 2004, but since that time has had pain on a daily basis and has been limited in his ability to work.

The trial court issued a written memorandum opinion. Based upon discrepancies between the medical records and Mr. Peck’s testimony, it concluded that he had not sustained a compensable injury and dismissed the complaint. Thereafter, Mr. Peck filed a motion to alter or amend. The court issued a memorandum reviewing the reasons for its original decision and denied the motion.

Mr. Peck has appealed, contending that the evidence preponderates against the trial court’s conclusion that he did not sustain a compensable injury.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court’s conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm’t Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

In his brief, Mr. Peck raises several complaints regarding his representation at trial.³ Apparently, his original attorney, Stewart Jenkins, and Mr. Jenkins' legal assistant, Sheila Brackett, both passed away after the suit was filed but before trial. Mr. Peck was represented thereafter by another member of Mr. Jenkins' firm. Mr. Peck argues that his trial attorney failed to introduce important medical records (presumably those of Dr. Findley) at trial. He argues that those records would have led the trial court to rule in his favor. However, we are unable to evaluate that contention, because the contents of those records were not offered at trial, nor were they offered incident to Mr. Peck's motion for new trial, even though the trial court had surmised in its memorandum opinion that the records were not offered because they would not have been helpful to Mr. Peck. Mr. Peck also contends that the trial court misunderstood or misconstrued the emergency room medical record for November 29, 2004.

Hochman argues that the evidence does not preponderate against the trial court's initial decision and that the motion to alter or amend did not satisfy the requirements for granting a new trial or for changing the original judgment.

In both its initial decision after trial on the merits, and in ruling on Peck's motion to alter or amend, the trial court made extremely detailed analyses of the evidence before it. It pointed out the existence of many inconsistencies between Mr. Peck's trial testimony and the emergency room records of November 29, 2004. Not only did the record indicate Mr. Peck denied an injury, but Hochman's records indicate the last day Mr. Peck worked was November 22, 2005. The emergency room records indicated he had been experiencing pain for two days. Dr. Humphrey testified that normally the symptoms of a back injury would appear within 24 to 36 hours of the event, rather than several days later as in this case.

The court also described post-injury behavior by Mr. Peck that it viewed as reflecting upon his claims. For example, on April 1, 2005, Mr. Peck reported to Dr. Humphreys' office that he was working only four hours per day as instructed. The trial court found that this report was patently false based upon the time records presented by Hochman and adversely reflected on Mr. Peck's credibility. The trial court also noted that the September 14, 2005, examination of Mr. Peck by Dr. Humphreys revealed that he was neurologically normal, that all ranges of motion that were previously limited were now full within normal limitations in all directions, and that there were no complaints of pain during the examination even though Mr. Peck stated at the beginning of the examination that he was still experiencing pain. The trial court concluded the evidence presented was consistent with Mr. Peck having suffered a muscle strain from which he had fully recovered as of his last visit to Dr. Humphreys. This conclusion is supported by the fact that Mr. Peck did not seek additional treatment from Dr. Humphreys.

In his deposition, Dr. Humphreys' testimony with regard to the issue of causation is equivocal. Nevertheless, that evidence would probably have been sufficient to support an award for Mr. Peck, if the trial court had ruled in his favor. However, the trial court did not do so. Viewing the case from that perspective, the vagueness of Dr. Humphreys' testimony does not provide us

³Although Mr. Peck was represented by counsel at trial, he is pro se on appeal.

with a basis for concluding that the evidence preponderates against the trial court's determination. That is especially true in light of the trial court's finding regarding the reliability of Mr. Peck's testimony. We therefore conclude that the evidence does not preponderate against the judgment of the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Reginald G. Peck, Sr., for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE